

Animal Rights Scrutiny¹

Introduction: Pet rights

The Renters' Rights Bill 2024, currently before the United Kingdom parliament, includes a clause to insert the following into the English and Wales housing statute, and the country's residential lease contracts:²

It is an implied term of every assured tenancy to which this section applies that—

- (a) a tenant may keep a pet at the dwelling-house if the tenant asks to do so in accordance with this section and the landlord consents;*
- (b) such consent is not to be unreasonably refused by the landlord;*
- (c) the landlord is to give or refuse consent in writing on or before the 28th day after the date of the request...*

The government's 'memorandum' addressing compatibility with Europe's human rights convention concedes that this provision engages landlords' property rights:³

The Bill places more duties on landlords to provide tenants with a written statement of terms and new duties when faced with a request from a tenant for a pet. All of these constitute an interference in how a landlord manages their property.

but argues that this interference is justified by needs of tenants (especially lonely ones):

The legitimate aim underlying the pets measure in particular is that owning a pet is critical to many people's well-being – both mental and physical. There are a growing number of single people and older people living in the PRS who may depend on a pet for companionship.

and is proportionate because:

it will still be possible for a landlord to refuse a tenant's request for a pet where it is reasonable to do so, and where a landlord does consent, the Bill allows the landlord to require the tenant to obtain insurance against pet damage or pay the reasonable costs of the landlord procuring such insurance.

This will all be familiar in our region, where similar provisions were introduced (and mostly enacted) in recent years in every Australian state and territory and New Zealand.⁴

¹ Jeremy Gans. Work-in-progress draft for the Australia-New Zealand Scrutiny of Legislation Conference, Melbourne, December 2024.

² Renters' Rights Bill 2024, cl. 10 (UK).

³ Renters' Rights Bill 2024 European Convention on Human Rights Memorandum, pp. 13-14.

⁴ *Residential Tenancies Amendment Act 2019 (ACT)*, s. 14; *Residential Tenancies Amendment Act 2024 (NSW)*, schedule, cl. 9; *Residential Tenancies Amendment Bill 2024*, cl. 16 (NZ); *Residential Tenancies Legislation Amendment Act 2020 (NT)*, s. 6; *Housing Legislation Amendment Act 2021 (Qld)*, s. 44; *Residential Tenancies (Miscellaneous) Amendment Act 2023 (SA)*, s. 26; *Residential Tenancy Amendment Bill 2024 (Tas)*, cl. 5; *Residential Tenancies Amendment Act 2018 (Vic)*, s. 61; *Residential Tenancies Amendment Act 2024 (WA)*, s. 33.

Even allowing for differences between the various proposals, the human rights assessments for these regimes were startlingly varied. Queensland's explanatory material discussed landlords' property rights (as in the United Kingdom) but also tenants' expressive rights. New Zealand's addressed landlords' expressive rights, tenants' presumption of innocence and the right to housing. The ACT's memorandum briefly mentions tenants' privacy rights. The Northern Territory's statement of compatibility lauds its provision's positive impact on the rights of families and children. Victoria's simply ignored the provision on pets.⁵ Parliamentary committee scrutiny similarly varied, ranging from the New Zealand and Northern Territory committees' detailed inquiries and recommendations about the provisions, to New South Wales's and Queensland's conclusions that the provisions strike an appropriate balance and the ACT's and Victoria's committees simply not reporting on them.⁶ Parliamentary committee scrutiny is yet to occur for the current United Kingdom bill; however, a similar bill from the previous parliament was preceded by a select committee report that, (like the Northern Territory's committee) recommended against enacting the provisions and (like Victoria's provision) was not discussed by its human rights scrutiny committee.⁷

The commonality amidst this diversity is an exclusive focus on the rights of two sets of stakeholders: landlords and tenants. But a further United Kingdom committee is an exception. Its report on the bill was exclusively on the pet provisions and recommended:

- Landlords' guidance should focus on all vertebrates, not just cats and dogs
- Guidance should clarify that tenants can request to keep more than one pet
- More consideration should be given to the welfare of new tenants' existing pets
- The resource implications of an increased pet population should be considered and consulted on.
- The proposed redress scheme should include training on pets' welfare needs.

As can be readily seen each of these proposals is about the needs of pets. The reason for that is that this additional committee is a new beast in the scrutiny world: the United Kingdom's Animal Sentience Committee.

⁵ Explanatory Statement to the Residential Tenancies Amendment Bill 2018 (No. 2) (ACT); Departmental Disclosure Statement, Residential Tenancies Amendment Bill (NZ); Office of Legal Counsel, *Consistency with the New Zealand Bill of Rights Act 1990: Residential Tenancies Amendment Bill* (NZ); Explanatory Statement to the Residential Tenancies Legislation Amendment Bill 2019 (NT), p. 9; Housing Legislation Amendment Bill 2021 Statement of Compatibility (Qld); Statement of Compatibility for the Residential Tenancies Amendment Bill 2018 (Vic).

⁶ Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report 24*, p. 8 (ACT); Legislative Review Committee, *Digest No. 21/58*, p. 34 (NSW); Social Services and Community Committee, *Residential Tenancies Amendment Bill*, pp. 2-5 (NZ); Legislation Scrutiny Committee, *Inquiry into the Residential Tenancies Legislation Amendment Bill 2019 (NT)*, pp. 14-20; Community Support and Services Committee, *Report No. 7, 57th Parliament*, p. 61 (Qld); Scrutiny of Acts and Regulations Committee, *Alert Digest No. 12 of 2018*, pp. 20-23 (Victoria).

⁷ Levelling Up, Housing and Communities Committee, *Fifth Report of Session 2022-2023* (UK), pp. 53-55; Levelling Up, Housing and Communities Committee, *Reforming the Private Sector: Government Response to the Committee's Fifth Report of Session 2022-2023* (UK), pp. 23-24.

Ugly duckling

By an accident of my various academic side-interests, I predicted something like this would eventually happen.

Wearing my human rights hat, I've long bemoaned how Australian rights law is only for humans. A decade ago, I complained that Australian rights law doesn't protect the rights of various non-humans who are protected elsewhere – corporations, communities, groups and governments – and pointed out, mostly for fun, that it also omitted others, including artificial life, aliens... and animals.⁸ I noted that dignity, the usual source of legal rights, is arguably possessed by various non-humans: groups, some corporations, 'apes, and maybe cats'. (Sorry, dog lovers.)

Wearing my parliamentary scrutiny hat, I read with interest a statement of compatibility for a 2019 Victorian private members bill on duck hunting, which opted to refer to some non-human animal rights as well as the notion of animal sentience:⁹

This Bill, drafted in order to protect certain birds in Victoria, recognises, and is compatible with, the Universal Declaration of Animal Rights solemnly proclaimed in Paris on 15 October 1978 at the UNESCO headquarters and revised in 1990, which states that:

- *All animals are born with an equal claim on life and the same rights to existence.*
- *Humans, as a species of animal shall not arrogate to him or herself the right to exterminate or inhumanely exploit other animals.*
- *No animal shall be ill-treated or shall be subject to cruel acts.*
- *All wild animals have the right to liberty in their natural environment, whether land air or water.*
- *Deprivation of freedom, even for educational purposes, is an infringement of this right.*
- *The rights of animals, like human rights, should enjoy the protection of law.*

This Bill furthers the recognition that non-human animals are sentient individuals with their own intelligence, emotion and subjective experience of life that they have a fundamental right of birth to enjoy without the risk of being hunted, taken and destroyed. In my opinion, the Wildlife Amendment (Protection of Birds) Bill 2019, as introduced to the Council, is compatible with the Charter.

And, the next year, wearing my animal law hat, I co-wrote a nerdy book on animal law, which included a conclusion about where animal law might go. It suggested that the Victorian duck bill 'shows how Victorian human rights law could potentially be extended to allow scrutiny of the impact that all new laws have on the rights of sentient animals'.¹⁰

⁸ J Gans, 'Denial of non-human rights protection in Australia' [2011] *New Zealand Law Review* 299

⁹ A Medick, *Statement of Compatibility*, Wildlife Amendment (Protection of Birds) Bill 2019, 11 September 2019.

¹⁰ K Barnett & J Gans, *Guilty Pigs* (Black Inc, 2021), p. 381

One year later, the United Kingdom, the main inspiration for Victoria's humans rights law, enacted the *Animal Welfare (Sentience) Act 2022*, which provides that:¹¹

- (1) *When any government policy is being or has been formulated or implemented, the Animal Sentience Committee may produce a report containing its views on the question in subsection (2).*
- (2) *The question is whether, or to what extent, the government is having, or has had, all due regard to the ways in which the policy might have an adverse effect on the welfare of animals as sentient beings.*

A further provision obliges the Environment minister to lay 'a response' to such reports before the parliament. Was I prescient, if not influential?

No. What I had gamely predicted was an expansion of parliamentary committee scrutiny. But, just because something looks like a parliamentary committee and reports like a parliamentary committee, does not mean it is a parliamentary committee. And so it is with the Animal Sentience Committee. While it is a creation of parliament and obliges Ministerial responses to the parliament, it is not of the parliament. Rather, it is established and maintained, and has its members appointed, by the executive, and publishes its reports itself.

Like many recent British oddities, this strange duck was hatched by Brexit. A consequence of the referendum the UK government had to work through which parts of European Union law that it wanted to keep, and one part it liked was a landmark treaty provision stating that the Union and its members 'shall, since animals are sentient beings, to pay full regard to the welfare requirements of animals' in formulating and implementing various Union policies.¹² In 2017, Environment minister Michael Gove consulted on a proposed law – the *Animal Welfare (Sentencing and Recognition of Sentience) Bill* – aimed at:¹³

ensuring animals will not lose any recognitions or protections once we leave the EU. The draft Bill I am publishing makes our recognition of animal sentience clear. It contains an obligation, directed towards government, to pay regard to the welfare needs of animals when formulating and implementing government policy.

Sailing wasn't smooth. The proposed obligation sparked pushback that it was unclear, unenforceable and susceptible to litigation. Pre-legislative parliamentary scrutiny instead recommended accountability 'through a reporting mechanism to Parliament, rather than through the courts'.¹⁴ The issue bubbled through the parliamentary debate on EU withdrawal and became a 2019 election promise, before culminating in the 2021 Bill for the Act that created the Animal Sentience Committee.

¹¹ *Animal Welfare (Sentience) Act 2022* (UK), s. 2.

¹² *Treaty on the Functioning of the European Union*, Art. 13.

¹³ Secretary of State for Environment, Food and Rural Affairs, *Animal Welfare (Sentencing and Recognition of Sentience) Draft Bill*, December 2017, p. 4.

¹⁴ House of Commons Environment, Food and Rural Affairs Committee, *Pre-Legislative Scrutiny of the draft Animal Welfare (Sentencing and Recognition of Sentience) Bill 2017*, Second Report of Session 2017–19, 31 January 2018, p. 12.

This combination – of responding to recent international norms via legislative recognition through the creation of a new committee sitting outside government with a broad remit to report on legislative and executive actions in order to drive political accountability without litigation – gives me a mild sense of déjà vu.

Elephant in the room

So, what does the Animal Sentience Committee do? Like blind men sharing a room with an elephant, it helps to first work out what the committee isn't.

First, despite its Brexit origins, it's not a mere domestication of the EU's animal sentience provision. For one thing, it isn't limited to the EU's areas of competence – fisheries, agriculture, and the like – and therefore covers wholly domestic issues like residential tenancies. As well, in place of an abstract duty that would require cumbersome international litigation to develop and enforce, it comes with a much more specific Ministerial duty to respond to committee reports, one where it's pretty straightforward for everyone to judge compliance for themselves.

Second, despite the Act's stated *raison d'être*, the new committee is not a mere 'recognition' that animals are sentient. Such recognitions are recently in vogue, including a proposal here in Victoria.¹⁵ However, while a submission on the UK bill lauded the ACT as 'the first legislature in the world to go beyond simply recognising animals as sentient by enacting an enforceable definition of sentience',¹⁶ the ACT law, like most others, is token stuff.¹⁷ By contrast, the UK law, while not enforceable in court, is accompanied by a novel, workable forward-looking mechanism for generating political or legal change.

Third, despite the committee's name, it isn't a mechanism for deciding which animals are sentient. That question is instead left to the Parliament –the Bill's first draft described 'any vertebrate other than homo sapiens' as sentient and that was then extended via house amendments to 'any cephalopod mollusc' and 'any decapod crustacean'– which in turn gives the Environment minister the power to bring 'invertebrates of any description within the meaning of "animal" for the purposes of this Act'. (Alas, no mechanism seemingly exists anywhere for recognising plants, fungi, virus, computers, extra-terrestrials, corporations or humans as sentience.)

As far as I know, there is no mechanism anywhere for recognising the sentience of plants, fungi, bacteria, viruses, artificial intelligence, extra-terrestrials, corporations or humans.)

¹⁵ Exposure draft, Animal Care and Protection Bill, 2022, cl. 6.

¹⁶ I Robertson & D Goldsworthy, *Written Submission of the Animal Sentience Law Foundation* (House of Commons Environment, Food and Rural Affairs Committee, *Inquiry into Animal Welfare Sentience Bill*, 2021), 5 July 2021, p. 7.

¹⁷ *Animal Welfare Legislation Amendment Act 2019* (ACT), s. 3, inserting s. 4A into the *Animal Welfare Act 1992* (ACT).

Nor is either the government or the committee interested in defining sentience. The Lords were told: ‘it is very difficult to define, so the Government have not done it’.¹⁸ And, while the committee’s proposed draft terms of reference said that ‘Sentience may be defined by the Committee for its own purposes’,¹⁹ its current website states that the committee ‘focuses on the welfare of animals as sentient beings, not on the definition or philosophical meaning of animal sentience.’²⁰

Finally, the committee’s reports are not about assessing what is best for animals, as that is the task of an existing United Kingdom committee, the Animal Welfare Committee, whose remit – to advise on the welfare of animals - was recently broadened from farm animals to companion and wild animals, and which issues a range of ‘opinions’ on these topics.²¹ With varying names, there are similar bodies everywhere (including a legislative proposal here in Victoria²²) and they all mainly provide expert advice to government on the fine details of animal welfare regulations.²³

So, what does this further United Kingdom committee do? After this question was unsurprisingly raised in debate and scrutiny of the 2022 Act, two law academics supplied the following answer:²⁴

The remit, role and required expertise of the ASC can be distinguished from such advisory committees because its function is fundamentally different. It will not be concerned with the substance of policy but merely with the process by which it is formulated and implemented. Specifically, whether it is satisfied that in formulating and implementing policy the government has had all due regard to the possible adverse effects on the welfare of animals as sentient beings, This is the beginning and end of its role: it is exclusively focused on how policy is developed and put into practice, not its content.

The two academics were especially keen to note that the new committee isn’t a policy committee:

The ASC will have no direct influence over the substance of policy, which will remain – as it should – exclusively a matter for ministers. Further, it will not be part of the ASC’s role to comment on the merits of any policy and, providing a minister has had all due regard to the adverse effects on animal welfare, neither will it have any influence over the weight to be applied to such considerations; that issue will remain entirely within the discretion of ministers who may, quite legitimately, decide that competing factors

¹⁸ Lord Forsyth of Drumlean, *Hansard* (House of Lords), 16 June 2021, Column 1913.

¹⁹ Department for Environment, Food & Rural Affairs, *Animal Sentience Committee Terms of Reference*, 17 June 2021, p. 22.

²⁰ < <https://www.gov.uk/government/groups/animal-sentience-committee>>, accessed 28 November 2024.

²¹ See < <https://www.gov.uk/government/groups/animal-welfare-committee-awc>>.

²² Exposure draft, Animal Care and Protection Bill, 2022, Part 15, Division 1.

²³ E.g. *Scottish Animal Welfare Commission Regulations 2020* (Scotland); *Animal Welfare Act 1999* (NZ), s. 56.

²⁴ M Radford & M O’Donohue, *Submission* (House of Commons Environment, Food and Rural Affairs Committee, *Inquiry into Animal Welfare Sentience Bill*, 2021), July 2021, [14].

should be given priority over that of animal welfare. Appreciating this is absolutely crucial to understanding the ASC's proposed role.

In short, having eliminated everything else – domestication, recognition, sentience determination, welfare determination, policy – it's now possible to piece together, particularly at this conference, exactly what sort of beast the Animal Sentience Committee seems to be: it's a scrutiny committee.

Peregrine view

Is the Animal Sentience Committee really a scrutiny committee? Scrutiny by who? With whom? Of whom? Of what? To what end?

At the time of writing (November 2024), the Animal Welfare (Sentience) Act got royal assent two-and-a-half years ago, the committee's first chair was announced over two years ago, the Act's main provisions commenced a year-and-a-half ago (when the remaining members were also announced), the committee's terms of reference were finalised 14 months ago, it issued its first letter shortly after that and its first report (on the Rental (Reform) Bill) nine months ago.²⁵ To date, all I have to go on is its website, which contains includes its current terms of reference²⁶ and its four reports to date. In short, the committee is simply too new for my hypothesis to be tested.

To start with 'by who?', the terms of reference state that the Minister 'seeks to appoint experts with appropriate experience relating to policy decision-making and/or the welfare of animals', may involve a recruitment process and 'may seek to promote a diversity of expertise'. The committee currently has six members, including its chair (the aptly named Michael Seals, a Derbyshire farmer), three uni professors (in agricultural economics, conservation medicine and animal welfare), an RSPCA officer and a veterinary surgeon.²⁷ Appointments are for four years, renewable once and are part-time, with each member expected to devote 15-20 hours a year to their tasks. The Minister reserves the right to terminate appointments on the grounds of performance, conflict of interest or disrepute.

The terms of reference require the committee to report in its own name, and all four of its reports to date report the views of 'the ASC'. As for how they are written, the ToRs say that the members will endeavour to reach full agreement and, if not, a mutually acceptable position, with any differences in opinion noted in the report; none note such differences so far. While the ToRs say that the Chair determines each report's content, each one so far has a 'governance' note at the end identifying two 'members who were responsible for

²⁵ Royal assent: 28 April 2022. Chair: 2 September 2022 (see <<https://www.gov.uk/government/news/michael-seals-confirmed-as-first-chair-of-the-new-animal-sentience-committee>>.) Commencement: 22 May 2023 (*Animal Welfare (Sentience) Act 2022 (Commencement) Regulations 2023* (UK), reg 2.) First letter: 11 October 2023 (*Animal Welfare Committee, Letter on XL bullies and the Dangerous Dogs Act*). First report: 6 February 2024 (*Animal Sentience Committee, Renters (Reform) Bill report*.)

²⁶ See Department for Environment, Food and Rural Affairs, *Animal Sentience Committee Terms of Reference, Version 1.0*, September 2023.

²⁷ See <<https://www.gov.uk/government/groups/animal-sentience-committee#members>>, accessed 28 November 2024.

developing this report'. For the three reports so far on Acts or bills, the two members were the agricultural economist (Richard Bennett) and the animal welfare academic (Christine Nicol).²⁸ For the other report on proposed revisions to regulations, the two members were the vet (Richard Cooper) and the conservation medicine academic (Anna Meredith.) That report adds that it was 'produced in December 2024' [scil 2023] and 'agreed in February 2024', although its content mainly details communications with government in the previous October and November.²⁹

As for 'with whom?', the Minister's announcement of the committee's establishment and membership described it as 'fully independent'. The draft ToRs in 2021 placed the committee within an 'Animal Welfare Centre of Expertise' in the Department of Environment, Food and Rural Affairs, alongside three existing committees (including the Animal Welfare Committee), who would share a 'joint secretariat' and 'one joint website and point of contact'.³⁰ But there is no sign of the AWCE now and the current committee seemingly has its own (department-hosted) website. In 2021, it was proposed that the committee 'should be expected to engage closely with' the Animal Welfare Committee, but its current ToRs merely say that it 'may' do so, and a previous 'encourage[ment] to draw on each other's expertise' has been dropped. While cross-appointments were and are still allowed, previous language allowing one person to chair multiple committees is gone. More importantly, there seem to be no current overlaps in membership. The changed approach (if it is one) isn't explained, but is consistent with the committee's remit of reviewing procedures for informing government about animal welfare, which would seemingly include some scrutiny of the existing expert committees.

The ToRs say that the committee has a secretariat (with no employees currently identified), based within the environment department, whose functions include administration, communication and the like, but seemingly not preparation of reports. The committee may engage with government departments for policy overviews, information or advice (with assistance from the secretariat), and that the committee may report any failures to engage. As well, the committee 'may... seek input, evidence, and views from external specialists and expert bodies', liaise with the portfolio parliamentary committee and engage with stakeholders or the wider public. There's no sign of the committee hiring, or even being allowed to hire, an external consultant to monitor laws, research issues, draft reports or the like, and it seems that, so far, the members do that on their own.

Scrutiny 'of whom?'. The Act says the committee 'may report... [w]hen any government policy is being or has been formulated or implemented', although a further provision excludes 'devolved' (ie. Welsh, Scottish and Northern Irish) policies. Its ToRs envisage the committee (somehow) 'form[ing] an overview of all government policy decisions

²⁸ Animal Sentience Committee, *Renters (Reform) Bill Report*, 6 February 2024; Animal Sentience Committee, *Animals (Low Welfare Activities Abroad) Act Report*, 19 February 2024; Animal Sentience Committee, *Online Safety Act Report*, 23 October 2024.

²⁹ Animal Sentience Committee, *Assessment of Veterinary Medicines Regulations (2013) Revisions*, 1 March 2024.

³⁰ Department of Environment, Food and Rural Affairs, *Animal Sentience Committee Terms of Reference, Final Draft for Circulation*, 17 November 2021.

which have a significant material or possible effect on the welfare of sentient animals’, though only of decisions that ‘are of a higher priority from an animal welfare perspective’. From this peregrine standpoint, the committee selects what it wants to report on, and may ‘prioritise’ decisions that are ‘significant’ in various ways – impact on animals, government and public interest, types of evidential issues presented – as well as whether a policy decision is ‘already subject to other scrutiny arrangements’. Finally, given its ‘accountability’ remit, it ‘may prioritise current or recent policy decisions’ but is allowed to look at past decisions that may bear on ongoing issues’.

The committee’s ToRs define a policy as:

a decision made or implemented by a Minister which affects the activities of government, business, charities, or members of the public. This includes, but is not limited to, the processes of making regulations, legislating, allocating resources or promoting a course of action.

However, ‘The Committee is not expected to consider individual operational decisions (e.g., planning adjudication decisions) nor to consider matters of fiscal policy’ and is seemingly barred from reporting on topics where no government policy is proposed. The committee’s remit is nevertheless broad and not limited to legislation; however, so far, its reports have covered a bill introduced and two Acts enacted just before the committee was formed, while the fourth was in the late stages of a public consultation on revisions of existing regulations. In contrast to the Animal Welfare Committee,³¹ the committee has no public workplan, but has published two items of correspondence - one on the possibility of adding a dog breed to a dangerous dogs statute, another to a portfolio parliamentary committee on a pre-legislative consultation on bovine tagging – but it’s unclear whether these involve completed, ongoing or planned work. In short, the committee’s reports have so far been directed itself to the same sorts of government actions (including pre-legislative scrutiny) that UK parliamentary scrutiny committees (such as the Joint Committee on Human Rights) usually report on.

Scrutiny ‘of what?’ The Act permits the committee to report on ‘whether, or to what extent, the government is having, or has had, all due regard to the ways in which the policy might have an adverse effect on the welfare of animals as sentient beings.’ However, there’s no mechanism, as there is for human rights scrutiny in the UK and elsewhere, requiring the government to identify what it considered when it did things like propose new laws. The committee can, of course, ask the government what it considered, but it needs to work out for itself what to ask about and it hasn’t said how it does this or otherwise learns and assesses what the government is doing. What is notable, though, is that, while two of its reports and both of its letters are on animal-specific laws or regulations – with one simply concluding that ‘there are no significant negative implications or animal welfare impacts in respect of the proposed legislation’ – are on laws that are largely or entirely focused on humans: the renters’ rights bill and an online safety law. It seems likely its members or someone they employ or consult with is broadly eyeballing all government actions for ones that seem to affect sentient animal welfare and then comparing them to what might have been done if sentient animal welfare was fully considered.

³¹ Animal Welfare Committee, *Animal Welfare Committee Workplan*, October 2024.

Or something like that. The committee's report on the *Online Safety Act 2023*, which obliges various internet services to remove illegal or harmful online content, including content that includes various 'offences', concluded:³²

due regard was paid to animal welfare when an amendment to include unnecessary suffering to animals as a priority illegal offence was made. However, all due regard was not paid when selecting a method (reference to the Animal Welfare Act 2006) to achieve this.

The 'amendment' referred to in the first sentence was a house amendment (so the implication is that due regard was lacking until then.) As for the second sentence – seemingly the committee's first negative finding – some of its reasons, for example, that the *Animal Welfare Act* does not ban torture of cephalopods or wild animals, and therefore the online safety act won't cover videos of such suffering – seem well within the committee's statutory term of reference. However, the committee's central complaint – that the *Animal Welfare Act* itself only criminalises causing animal suffering, not recording or distributing videos of it – seems to go beyond scrutiny of a mechanism for keeping illegal content off the net. Of course, staying within scrutiny grounds is a common issue in traditional scrutiny.

Finally, scrutiny 'to what end?' The Act allows a committee report to 'may also contain recommendations as to the steps the Committee considers the government should take for the purpose... of ensuring that, in any further formulation or implementation of the policy, the government has all due regard to the ways in which the policy might have an adverse effect on the welfare of animals as sentient beings.' Three of the committee's four reports to date – i.e. all but the one that concluded that an Act had no adverse impact on animal welfare – have contained such recommendations. The only guidance for the committee on what it can recommend is a provision (taken from the European treaty provision and inserted by a house amendment) that any recommendations 'must respect legislative or administrative provisions and customs relating in particular to religious rites, cultural traditions and regional heritage'.

The committee's most recent report on the Online Safety Act has some startling recommendations. The committee recommended 'that officials and ministers consider whether an amendment to the Animal Welfare Act or to the OSA could be made to prohibit recording and publishing material that depicts the unnecessary suffering of animals (unless such material is clearly intended to prevent such suffering)', pointedly adding that a mooted alternative – interpreting the ban on obscene communications more broadly – 'will only partially address the shortcoming and so does not pay due regard to animal welfare'. It also recommended that 'that guidance should emphasise that viewing recordings of unnecessary suffering of animals has a high potential to encourage others to cause suffering to animals', and that is hard to square with the expertise of the committees' members. These recommendations cast doubt on my hypothesis that the committee is a traditional scrutiny committee.

The Act gives government three months to respond to committee reports, but time stops during joint adjournments of more than a week, dissolutions or prorogations (e.g the 7

³² Animal Sentience Committee, *Online Safety Act Report*, 23 October 2024.

week 2024 election period.)³³ The government responded to the 6 February 2024 report on the rental reform on 9 May 2024 (after the joint three-week Easter recess.)³⁴ It expressly agreed with one recommendation – to liaise with organisations knowledgeable about less common pets, which it said it had now initiated – and claimed that it had already widely consulted on welfare implications for higher pet populations and that guidance for the ombudsman would include pet welfare information. However, it suggested that the committee’s concerns about multiple pets were based on a misunderstanding of the legislation, which already allowed multiple requests, and batted off the concerns about new tenants as something that would come on its own when landlords got used to the new rules. However, when the new government re-introduced the bill, the committee published an ‘additional note’ welcoming the reduction of the landlord’s decision period from the previous 42 days to 28 as ‘in line with the ASC’s recommendation’.³⁵ The new government responded to the two reports on animal-specific rules (including the entirely positive report) six months after they were made and in the months after the election, with the only recommendations met with a claim that what was recommended was always intended and that that would be made clear.³⁶

These responses are familiar ground for parliamentary scrutiny committees. The government’s response on the late October report on the online communications bill is seemingly due (taking into account Christmas and February recesses) in late February, and may perhaps be more telling.

Conclusion: The bear pit

The above is my case for a tentative view that the Animal Sentience Committee engages in a form of traditional legislative scrutiny, albeit from outside parliament and on a non-traditional ground, albeit one that at least one of the committee’s four reports to date doesn’t quite fit. I will conclude by briefly addressing another new parliamentary body that provides a telling contrast.

Two weeks after the UK’s environment minister established the Animal Sentience Committee, the upper house of the Legislative Council established an Animal Welfare Committee.³⁷ The new upper house committee’s function is to ‘inquire into and report on matters relating to the welfare and protection of animals in New South Wales’, by upper house referral or by self-reference. The resolution was moved by the new ALP government’s environment minister, who explained that the previous parliament’s portfolio committees had heard many inquiries about animals – the committee’s prospective chair detailed ‘an unprecedented number of inquiries into animal issues

³³ *Animal Welfare (Sentience) Act 2022*, s. 3.

³⁴ Department for Leveling Up, Housing and Communities, *Animal Sentience Committee’s report on the Renters (Reform) Bill: government response*, 9 May 2024.

³⁵ Animal Sentience Committee, *Additional note: new Renters’ Rights Bill*, 23 October 2024.

³⁶ Veterinary Medicines Directorate, *The Government’s response to the Animal Sentience Committee’s assessment of the Veterinary Medicines Regulations (2013) revisions*, September 2024; Department for Environment, Food & Rural Affairs, *Government response to Animal Sentience Committee: Animals (Low Welfare Activities Abroad) Act Report*, October 2024.

³⁷ Legislative Council, *Hansard*, 22 June 2023.

such as battery cages, cruelty laws, the use of animals in so-called entertainment, animal experimentation, puppy farming, ag-gag laws, kangaroos, koalas and mulesing, just to name a few’ – and therefore ‘The Government wants to support the establishment of a generalist animal welfare committee so that animal welfare issues can be pursued in the normal way’. The resolution was opposed by the opposition, who argued that portfolio committees could do the job, while the Greens sought changes to reduce government dominance, but these views were rejected in the usual not-especially-civil debate.

Pursuant to the resolution, the committee has four government members, two opposition ones and two-cross-benchers; one, Emma Hurst from the Animal Justice Party, specified in the resolution as the committee’s chair, while the other was a Shooter. Ten weeks later,, the Chair proposed and the committee agreed to inquire into aerial shootings of brumbies in Kosciusko National Park. That inquiry ran for nearly 14 months, received 540 submissions, held five public hearings and a site visit and issued a 150 page report last month, ultimately recommending that the brumbies continue to be shot. The minority reports and minutes reveal that this recommendation, and other aspects of the report, were bitterly opposed by the committee’s chair.³⁸ Two months ago, the committee commenced a further inquiry into cat population management in NSW.

Suffice to say, although Animal Welfare Committee superficially resembles a scrutiny committee only in its origin, location and composition in parliament and its name, it is obviously a policy committee. Meanwhile, the NSW parliament’s committee that examines new laws for gaps of those sorts continues to work under terms of reference – ‘trespasses unduly on personal rights and liberties’, ‘may have an adverse impact on the business community’³⁹ – that allow little, if any, scrutiny on matters of animal welfare.

Why has neither jurisdiction – nor any I’m aware of, but I could well be unaware of such things – taken the route I mooted in *Guilty Pigs* of expanding traditional scrutiny to include the welfare of animals? The short answer is that neither seems to have thought of it. The UK started with domesticating Europe’s duty to consider the welfare of sentient animals and created a local committee to avoid creating local law. An in NSW, despite incoming chair Hurst arguing that ‘its very existence will show a willingness from the Government to hear from the community about important issues surrounding animal protection laws’ and to detect gaps in those laws’, the new committee was instead created to generalise parliament’s existing policy work on issues of controversy.

The longer, more speculative answer is that animal welfare concerns differ too much from traditional scrutiny grounds to accommodate a parliamentary form of scrutiny. Traditional scrutiny grounds involve institutional norms, legal cases and constitutional, quasi-constitutional or treaty texts, whereas animal welfare doesn’t do any of that for now. In *Guilty Pigs*, I note that this position is changing in some countries and for some animals, but these are tentative steps and none are yet to reach common law countries.

³⁸ Animal Welfare Committee, *Report 1: Proposed aerial shooting of brumbies in Kosciuszko National Park*, November 2024.

³⁹ *Legislative Review Act 1987* (NSW), ss. 8A(b)(i) & 9(b)(i),(ii).

In its place, the ToRs of the UK Animal Sentience Committee state that it relies on the following definition of ‘adverse effects’:

Adverse effects are where a policy may have a negative effect on the welfare of animals as sentient beings, such as animals being deprived of one or more of the five “welfare needs” as set out in the Animal Welfare Act 2006.

The relevant provision is seemingly this one (a criminal offence):⁴⁰

- (1) *A person commits an offence if he does not take such steps as are reasonable in all the circumstances to ensure that the needs of an animal for which he is responsible are met to the extent required by good practice.*
- (2) *For the purposes of this Act, an animal's needs shall be taken to include—*
 - (a) *its need for a suitable environment,*
 - (b) *its need for a suitable diet,*
 - (c) *its need to be able to exhibit normal behaviour patterns,*
 - (d) *any need it has to be housed with, or apart from, other animals, and*
 - (e) *its need to be protected from pain, suffering, injury and disease.*
- (3) *The circumstances to which it is relevant to have regard when applying subsection (1) include, in particular—*
 - (a) *any lawful purpose for which the animal is kept, and*
 - (b) *any lawful activity undertaken in relation to the animal.*
- (4) *Nothing in this section applies to the destruction of an animal in an appropriate and humane manner.*

That is, the committee has looked to the non-constitutional law – statute law – to define its ground of scrutiny. Relevantly, all Australasian jurisdictions have laws at least somewhat like this.⁴¹

But there is no sign so far in the committee’s reports of any reference to this statutory provision, or any case law or practice about it. This points to a related problem with adding animal welfare to the scrutiny grounds of traditional parliamentary scrutiny committees. In contrast to legal and human rights norms, which are the subject of extensive legal analysis – in statutory provisions, case law, legal treatises and the like - the contents of animal welfare norms are more contained in practice, philosophy, politics and public sentiment. Not only is all of that harder to distinguish from policy, but it is also not knowledge that can be plausibly held by politician members, or by a ‘legal adviser’ to such a scrutiny committee or, for that matter, by any one expert anywhere. Rather, such

⁴⁰ *Animal Welfare Act 2006 (UK)*, s. 9.

⁴¹ *Animal Welfare Act 1992 (ACT)*, s. 6B; *Prevention of Cruelty to Animals Act 1979 (NSW)*, s. 8; *Animal Protection Act 2018 (NSW)*, s. 6; *Animal Welfare Act 1999 (NZ)*, s. 3; *Animal Care and Protection Act 2001 (Qld)*, s. 17; *Animal Welfare Act 1985 (SA)*, s. 13(3)(b); *Animal Welfare Act 1993 (Tas)*, s. 8(2)(e) (and see s. 6); *Prevention of Cruelty to Animals Act 1986 (Vic)*, s. 9(1)(f) (and see the 2022 exposure draft of the *Animal Care and Protection Bill*, cl. 17); *Animal Welfare Act 2002 (WA)*, s. 19(2)(d),(e).

a committee may perhaps need a committee of its own to advise it – one that will presumably look a lot like the Animal Sentience Committee – and, at that point, it may simply make sense to eliminate the middle-man and simply let that committee of experts do the scrutiny itself. Whether it can do it on its own (notably without a legal expert scouring the statute book, or politicians keeping it on a neutral keel) is will hopefully be able to learn from United Kingdom’s creation, in the years to come.